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No. 89-1955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALASKA AIRLINES, INC.,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated DISTRICT LODGE 143, and its affiliated LOCAL LODGE 2202,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT	6
I. THE FIRST QUESTION PRESENTED IS BASED UPON A MISREADING OF THE COURT OF APPEALS' DECISION AND IS NOT PROPERLY BEFORE THE COURT	6
II. PETITIONER'S CHALLENGE TO THE SUFFICIENCY OF THE ADJUSTMENT BOARD'S EXPLANATION OF ITS RULING RAISES NO ISSUE WORTHY OF PLENARY REVIEW	8
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 9
Agipcoal USA, Inc. v. Mine Workers, cert. denied, 58 U.S.L.W. 3427 (Jan. 8, 1990) 10
Air Line Pilots v. Delta Air Lines, Inc., cert. denied, 58 U.S.L.W. 3218 (Oct. 2, 1989) 10
Atchison, Topeka and Santa Fe Railway Co. v. Buell, 480 U.S. 557 (1987) 7
Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) 9
Berklee College of Music v. Berklee Chapter of Mass. Federation of Teachers, 858 F.2d 31 (1st Cir. 1988) 10
Clinchfield Coal Co. v. Mineworkers, 720 F.2d 1365 (4th Cir. 1983) 11
Ethyl Corp. v. Steelworkers, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986) 11
Gonce v. Veterans Administration, cert. denied, 58 U.S.L.W. 3240 (Oct. 10, 1989) 10
Norton v. Mathews, 427 U.S. 524 (1976) 7
Paperworkers v. Misco, 484 U.S. 29 (1987) 7
Steelworkers v. Enterprise Wheel And Car Corp., 363 U.S. 593 (1960) 6, 7, 9
Union Pacific Railroad Co. v. Price, 360 U.S. 601 (1959) 9-10
Van Lare v. Hurley, 421 U.S. 338 (1975) 7
Young Radiator Co. v. Autoworkers, 734 F.2d 321 (7th Cir. 1984) 11

STATUTES

Railway Labor Act, 45 U.S.C. 151, *et seq.* ..... *passim*
45 U.S.C. § 152 ..... 1-2, 3

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The district court issued two opinions in this case not cited by Alaska Airlines at page two of its certiorari petition and not reproduced in the appendix to that petition. These opinions are reported at 124 LRRM 2458 and 124 LRRM 2463, and are reproduced in Respondents' Appendices A & B ("Res. App. A" and "Res. App. B," respectively).

STATUTORY PROVISIONS INVOLVED

In addition to those provisions cited by petitioner, the statutory provisions involved in this case include 45

U.S.C. § 152 (Fourth) and (Eighth). These provisions are reprinted in Respondents' Appendix C.

STATEMENT OF THE CASE

Respondents International Association of Machinists and Aerospace Workers, AFL-CIO, and its affiliated Air Transport District Lodge 143 and Local Lodge 2202 ("Union") are labor organizations representing employees of Petitioner Alaska Airlines ("Airline"), an air carrier. In March 1985 the Union struck the Airline. During the strike the Airline hired permanent replacements, and continued to operate with these replacements along with union members who did not honor the Union's picket lines. The strike was settled in June 1985, at which time the parties signed both a new collective bargaining agreement and a back-to-work agreement. Appendix to the Certiorari Petition ("Pet. App.") A at 2.

This case arises out of a dispute over the interpretation of these two contracts. Specifically, the Airline interpreted the contracts to require that strike replacements and employees who worked during the strike should fill all post-strike job vacancies ahead of senior former strikers awaiting recall. The Union understood the contracts to require that new positions should be filled based on seniority, without reference to whether employees had been on strike.

The Court of Appeals correctly summarized the cause of the contractual ambiguity that led to the dispute:

> The back to work agreement provides that strikers will be recalled after Alaska complies with the provisions in the new collective bargaining agreement dealing with vacancies. Article 10 of the collective bargaining agreement states that a vacancy may be filled by a new hire or by an upgrade from a lower classification if "no qualified employees bid." *See*, E.R., Exhibit 19, at 10. Alaska contends that the term "qualified employees" does not include strikers; the Union contends that it does. [Pet. App. A at 8]

The term "qualified employees" is not defined in the contracts.

The Union filed this action in October 1985, challenging the Airline's interpretation of the contracts, and seeking to enjoin the Airline's implementation of its interpretation of the contracts until after the issue was resolved through arbitration before the System Board of Adjustment. The district court denied the injunction, finding no irreparable harm, while at the same time recognizing that the dispute was "essentially a minor dispute over contract interpretation." Res. App. B at 14a. That court recognized in particular that the parties disagreed over the proper definition of a "qualified employee" entitled to bid for job vacancies under Article X of the collective bargaining agreement. Res. App. A at 8a-10a. The district court accordingly held that the Union had "at least shown sufficiently serious questions going to the merits to make those questions a fair ground for litigation." *Id.* at 10a. Hence the court sent the matter to the System Board for resolution. *Id.* at 13a.

Before the System Board the Union pressed its argument that the contracts should be interpreted to give strikers recall rights according to their seniority. The Union also argued that any other interpretation of the two agreements would effectively punish strikers for engaging in a strike, and so would violate § 2 (Fourth) of the Railway Labor Act, 45 U.S.C. § 152 (Fourth), a statutory provision which by law is "made a part of the contract between the carrier and each employee and shall be binding over the parties" 45 U.S.C. § 152 (Eighth).

The System Board ruled for the Union. Pet. App. E. Addressing the Union's discrimination argument, the Board began its analysis first by stating that the Board "has the right to rule upon violations of the RLA . . . . However, a decision on this issue does not necessarily have to rely on that basis." *Id.* at 34. The Board then concluded that the back-to-work agreement as interpreted by the Airline, standing alone, "violated the basic agree-

ment between the parties and further violated the RLA" in that it discriminated against returning strikers. *Id.* at 35. The Board therefore ordered that former strikers were entitled to fill post-strike job vacancies on a seniority basis "as provided for in the agreement between the parties." *Id.*

The Airline at that point returned to the district court and filed a motion to vacate the relevant portion of the Board's order. That court granted the motion, concluding that the Board had based its award on the requirements of enacted legislation, and had "impermissibly used external sources" to interpret a contract provision that was unambiguous on its face. Pet. App. B at 6.

The Union appealed, and in an unpublished opinion, the Ninth Circuit reversed and reinstated the award. Pet. App. A at 2. The court of appeals rejected the district court's interpretation of the Board's award as having been based "solely on the RLA." *Id.* at 6. While recognizing that the Board's reasoning was not entirely clear, the court below understood the Board to have provided alternate grounds for its ruling:

> The Board did not, as appellee argues, base its decision "solely" on the RLA. While the order stated the Board's erroneous opinion that "it has the right to rule upon violations of the RLA", it also clearly stated that "a decision on this issue does not necessarily have to rely on that basis." E.R., Exhibit A, at 39.
>
> Given the Board's direct statement in its order that it was not relying solely on Alaska's violations of the RLA, the most reasonable reading of the order is that it is based on alternative grounds [one statutory, one contractual], each of which independently supports the Board's conclusion. At the very least, the Board's decision was ambiguous as to the extent of its reliance on the RLA. [Pet. App. A at 6].

Reviewing the contractual holding, the court of appeals then rejected the Airline's claim that the contracts taken

together were unambiguous and could be read only to support the Airline's position:

> The district court recognized the ambiguity of the recall policy in its original order, stating that neither the collective bargaining agreement nor the back to work agreement defined "qualified employee." E.R., Exhibit 19, at 10-11. It was the Board's duty to interpret this provision. *See, id.*, at 12. In doing so, it did not err in looking to the parties' intent and relevant case law to interpret the language of the agreements. [Pet. App. A at 8].

Relying on well-established precedents in this Court (and in the Ninth Circuit), the court below then ruled that since it was possible to construe the award as relying on the Board's interpretation of the relevant labor contracts, and since the Board offered a "plausible interpretation" of those contracts, it was error for the district court to vacate the award:

> The Board's award was based on the parties' collective bargaining and back to work agreements, and the Board did not exceed its jurisdiction in looking to the RLA, the parties' intent, or case precedent in interpreting the contracts. Given the degree of deference to be accorded the Board's contract interpretation, the award should not have been vacated. [Pet. App. A at 9].

Although it was not necessary to its decision, the court of appeals also determined that the Board would have had the "authority to look to the RLA in making its decision," even if that had been the only ground for its decision. Pet. App. A at 7.

ARGUMENT

I. THE FIRST QUESTION PRESENTED IS BASED UPON A MISREADING OF THE COURT OF APPEALS' DECISION AND IS NOT PROPERLY BEFORE THE COURT.

Petitioner's first question presented is "whether an airline labor arbitrator has the authority to nullify unambiguous contractual language on the basis of the putative requirements of . . . the Railway Labor Act." Pet. at i. In its petition the Airline explains that this question is present because "the Ninth Circuit recognized that the contractual language was clear and unambiguous" but "nonetheless declared that the System Board had the authority to ignore the clear contractual language and instead rely exclusively on the RLA." *Id.* at 3. *See also id.* at 8.

The short and sufficient answer to this question is that the Ninth Circuit recognized and declared no such thing.

The court of appeals *held* that the Board's decision rested on two independent grounds, one contractual, one statutory. *See* Pet. App. at 6. Reviewing the Board's contractual finding, the court below further held that the Board's interpretation of the contracts was a plausible one, and that the contracts taken together were ambiguous. Plainly, the court of appeals rulings in this regard are the kind case-specific, fact-based rulings this court does *not* sit to review.[1]

[1] Petitioner's real complaint, in fact, is not with the legal principles enunciated by the Ninth Circuit, but with its determination that the Adjustment Board's award was grounded in the contract. But the court's characterization is reasonable; indeed the Board itself stated that it need not make reference to anything but the two contracts to rule as it did, and concluded by ruling that the Airline's practice violated the labor agreement. As the court recognized, the most that can be said for the petitioner's assertion is that the award is ambiguous—it is arguably not entirely clear whether or not a ground for the Board's decision was contractual. That, however, was precisely the case in *Steelworkers v. Enterprise*

Based upon its analysis of the Board's ruling and of the relevant contract provisions, the court of appeals then affirmed the Adjustment Board's award on the basis of long-settled legal principles: that the standard of review of arbitration decision is "among the narrowest known to law," *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563 (1987), cited at Pet. App. A at 4, and that an award will be enforced so long as it even arguably "draw[s] its essence" from the parties' agreement. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), cited at Pet. App. A at 5. Plainly, in this regard, the ruling below is correct.

Indeed, the court of appeals explicitly recognized and accepted the precise legal principle petitioner in the first question presented claims that the court below rejected—

Wheel And Car Corp., 363 U.S. 593 (1960), where this Court ruled that "a mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." *Id.* at 598. *See also Paperworkers v. Misco*, 108 S.Ct. 364, 371 (1987) (award enforceable "as long as the arbitrator is even *arguably* construing or applying the contract") (emphasis added).

In any event, even if the Ninth Circuit's interpretation of the award was unreasonable—which it is not—its error would not warrant the granting of this petition. No legal issue would be decided were this Court to review the Ninth Circuit's decision to determine the accuracy of that court's characterization of a holding of a System Board of Adjustment.

Although not one of its questions presented, the Airline also objects to that part of the Ninth Circuit's opinion which states that the Board was entitled to rely exclusively upon the RLA in issuing its decision. *See* Pet. App. A-6 - A-7. That statement is plainly *dicta* or secondary holding, and is not necessary to the court's decision. The court's primary holding, stated at Pet. App. A-7 to A-9, and summarized in the opinion's concluding paragraph, was that the award drew its essence from the contract. Petitioner has suggested no reason why this Court should reach out and decide a question raised by a discussion not necessary to the decision below. *See, e.g., Norton v. Mathews*, 427 U.S. 524, 530 (1976); *Van Lare v. Hurley*, 421 U.S. 338, 344 (1975).

that an award "based on external legal sources, wholly without regard to the terms of the parties' contract" does not "draw its essence from the parties' agreement" and therefore is unenforceable. Pet. App. A at 5 (citations omitted). What the court of appeals squarely rejected was petitioner's claim that *this* award was such an award.[2]

II. PETITIONER'S CHALLENGE TO THE SUFFICIENCY OF THE ADJUSTMENT BOARD'S EXPLANATION OF ITS RULING RAISES NO ISSUE WORTHY OF PLENARY REVIEW.

Petitioner's second question presented asserts that the *real* reason for the Adjustment Board's ruling was the Board's belief that the back-to-work agreement violated the RLA. It is therefore an "abdication of [the reviewing court's] duty," petitioner claims, to "immunize" the award by relying on an "unstated" rationale that the award also can be justified in terms of the contract. Pet. at i, 17. There is no reason this Court should grant this petition to consider this issue.

1. First, in making this claim petitioner again misconstrues the decisions below. The contractual ground upon which the court of appeals relied in affirming the award was neither "unstated" in the arbitral award, nor was it insubstantial. The case was sent to arbitration only after the district court ruled that there was a question of contract interpretation to be decided by a Board of Adjustment. The issue presented to the arbitral panel to decide was: "Did the Company violate the Collective Bargaining

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[2] Although petitioner alleges a conflict among the courts of appeals on this question presented, it points to no cases creating such a conflict. Nor could it, for the legal principles concerning the judicial deference due to an arbitrator's interpretation of labor contracts are long-standing, well understood, and universally applied, by this Court, by the Ninth Circuit in this case, and by every other court of appeals.

Agreement and/or Back to Work Agreement?" Pet. App. E at 1. The Union's primary argument, exhaustively summarized in the Award, was contractual. And the award itself—though undoubtedly focused on an analysis of RLA principles—stated that the decision "does not necessarily have to rely" on any statutory ground, and concludes by stating that the Airline "violated the basic agreement between the parties" as well as the RLA. *Id.* at 34, 35. Though the Board's analysis is not perfectly clear, in the course of its discussion and conclusion the Board enunciated the central interpretive finding necessary to support its contractual holding; namely, that the collective bargaining agreement gave strikers the right to bid for vacant positions. Pet. App. E at 35.

This is *not* a case, in sum, in which the arbitral board attempted to insulate its decision by mouthing a contractual justification not present in the case, or in which the court of appeals fabricated a contractual rationale not relied upon by the arbitral panel.

2. Even on the assumption that petitioner correctly characterized the decision below, its second question raises no cert-worthy issue. The most petitioner can argue is that the court of appeals erred in enforcing an award on a ground referred to but not argued in detail in the arbitral award. Pet. at 21 & n. 11. That argument is doubly defective.

First, this Court has long since rejected the explicit premise of petitioner's argument; *vis*, that arbitral awards are enforceable only if the arbitrator exhaustively explains his conclusion and the explanation is "correct." To the contrary, "[a]rbitrators have no obligation to the court to give their reasons for an award." *Enterprise Wheel*, 363 U.S. at 598. *Accord Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 244 n. 4 (1962).[3] As the

[3] Conclusory awards are especially common in the Railroad Board of Adjustment. *See Union Pacific Ry. Co. v. Price*, 360 U.S. 601,

court below correctly recognized, so long as it can be determined that the arbitrator at least arguably grounded his decision on the labor agreement, the award should not be disturbed by the courts.

Moreover, having applied the correct legal standard, even if the court below had improperly applied that standard to the facts of this case—which it did not—petitioner suggests no reason for this Court to review this decision. Whether a decision "draws its essence" from the labor agreement or instead relies upon some improper extrisic ground ultimately is a factually-dependent determination made by the reviewing court. Courts for thirty years have been applying this standard to review arbitral awards, and there is no need now to review such fact-bound decisions.[4]

Nor is there anything about this case which suggests that review is particularly warranted here. In this regard, Petitioner points to three cases allegedly in conflict

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606 & n.4 (1959) (decisions are "customarily brief," "consisting of a sentence or two," making it difficult to determine the "real basis upon which the decision was reached.") (citation omitted).

[4] In the last term alone, this Court has denied *certiorari* in several cases challenging court decisions on the ground that an arbitrator's award either did or did not draw its essence from the labor agreement. Indeed, in one petition the "Question Presented" was virtually identical to the "Question Presented" in the instant case. *See Berklee College of Music v. Berklee Chapter of Mass. Federation of Teachers*, 858 F.2d 31 (1st Cir. 1988), *cert. filed*, No. 88-1828, 58 U.S.L.W. 3059 (Question Presented: "Is federal court reviewing arbitrator's decision under 29 U.S.C. 185 compelled to uphold decision if it can itself devise argument that it can 'imagine' could be accepted by 'some judges or arbitrators," even if argument was not relied on by arbitrator and even if arbitrator's decision exceeds arbitrator's authority and is contrary to plain language of underlying collective bargaining agreement?"), *cert. denied*, 58 U.S.L.W. (Oct. 2, 1989). *See also, e.g.*, No. 89-738, *Agipcoal USA, Inc. v. Mine Workers, cert. denied*, 58 U.S.L.W. 3427 (Jan. 8, 1990); No. 89-68, *Gonce v. Veterans Administration, cert. denied*, 58 U.S.L.W. 3240 (Oct. 10, 1989); No. 88-1901 *Air Line Pilots v. Delta Air Lines, Inc., cert. denied*, 58 U.S.L.W. 3218 (Oct. 2, 1989).

with this one. Pet. at 19-20. The cases are not in conflict; they demonstrate nothing more than that resolution of these claims call for a case-by-case analysis. In two of the cases, the reviewing courts found that the contract at issue unambiguously required a result opposite to that reached by the arbitrator. Here petitioner made the same argument, but the argument was rejected as a matter of fact by the court of appeals. *Compare Clinchfield Coal Co. v. Mineworkers*, 720 F.2d 1365, 1368 (4th Cir. 1983) (court found as a matter of fact that company leased "coal lands," not "coal mining operations" where contract unambiguously allowed it to do former and not latter) and *Young Radiator Co. v. Autoworkers*, 734 F.2d 321, 325 (7th Cir. 1984) (grievant admitted that he stole company property, arbitrator nevertheless refused to uphold his discharge even though the contract was unambiguous that theft was grounds for discharge under any circumstances). In the third case, *Ethyl Corp. v. Steelworkers*, 768 F.2d 180, 187 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986), the court enforced the arbitration award.

CONCLUSION

For the forgoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C85-2140M

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Plaintiff,

v.

ALASKA AIRLINES, INC.
Defendant.

ORDER

[Filed Aug. 25, 1986]

Before the Court is the third of a trilogy of cases arising from the 1985 strike by various unions against Alaska Airlines. This Court previously has considered motions filed by the clerical employees of the International Association of Machinists and Aerospace Workers (IAM) and the Association of Flight Attendants. Now before the Court is a motion by the mechanics unit of the IAM for a preliminary injunction against the airline.

The mechanics and the airline opened negotiations for a new contract in December 1983, and after exhausting the statutory procedures under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, the Union called a strike that began on March 4, 1985. During the course of the strike, Alaska hired hundreds of new employees it designated as "permanent replacements" for the strikers. Other positions were filled with existing employees who chose

to cross picket lines. The strike was settled on June 3, 1985, when the parties signed a new collective bargaining pact and a back to work agreement. The back to work agreement was drafted by Alaska, and provides for the recall of strikers in the order of seniority.

It is the Union's contention that from June 3, 1985 to the present, Alaska has refused to recall strikers with substantial seniority to available job openings and instead has filled openings with newly hired replacements with lesser seniority. The Union also says in the one year period after the strike, fewer than 10% of the strikers have been recalled to their former jobs.

Pursuant to the provisions of the Railway Labor Act, the Union filed a contractual grievance over the recall issue. According to the Union, Alaska has refused to expedite consideration of the grievance before the System Board of Adjustment, and also has twice declined to provide information essential to processing the grievance. The Machinists argue that because the grievance will not be decided by the System Board of Adjustment for at least six months and possibly longer, union members have lost their homes, cars, boats, and other possessions. All are seeking work with other companies, but many who have found such work have been forced to relocate. The Union seeks injunctive relief barring what it contends is a violation of the contract by the airline pending exhaustion of the grievance process.

DISCUSSION

The Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* and 181, *et seq.* specifies mediation and arbitration mechanisms to resolve labor disputes involving air carriers.

Under the RLA, all disputes arising between carriers and their employee unions either are major or minor. *Elgin, Joliet and Eastern Railway v. Burley*, 325 U.S. 711, 722-28 (1945), *affm'd on rehearing*, 327 U.S. 661 (1946). Minor disputes involve the meaning, interpreta-

tion, or proper application of existing collective bargaining agreements and are resolved through binding arbitration before a System Board of Adjustment. *IAMAW v. Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985); *International Association of Machinists and Aerospace Workers v. Republic Airlines*, 761 F.2d 1836, 1389 (9th Cir. 1985). Both parties agree this case involves a minor dispute and therefore the System Board of Adjustment has exclusive jurisdiction over the merits of the claim. 45 U.S.C. § 184.

However, although the Union acknowledges that jurisdiction to interpret the merits exclusively is within the province of the System Board, it contends the Federal courts have the power to impose a status quo injunction to preseve the Board's jurisdiction. *Brotherhood of Railroad Trainmen v. Chicago R&I Railroad Company*, 353 U.S. 30, 42 (1957); *Brotherhood of Locomotive Engineers v. MKT Railroad Co.*, 363 U.S. 528 (1960). In *MKT*, the Court upheld a status quo injunction requiring the carrier to restore conditions which existed prior to the initiation of a minor dispute. The court approved the use of injunctive relief and required reinstatement of workers or payment of wages to those not reinstated. Recognizing that the grievance procedure before the System Board of Adjustment is time consuming, the court said it had to consider the hardships that might be imposed upon out of work employees if they were required to await the Board's sometimes long delayed decisions.

> Moreover, such an examination is inherent in the grant of the injunction itself. Yet it is settled, since *Chicago River* [*Brotherhood of Railroad Trainmen v. Chicago River and IND Railroad Co.*, 353 U.S. 30 (1957)] that an injunction may issue to preserve the Board's jurisdiction. We think that, in logic, we must hold that the conditions are proper also, at least where they are designed not only to promote the interests of justice, but also to preserve the jurisdiction of the board.

> It is not difficult to perceive how the conditions imposed in this case could be deemed to serve to protect the jurisdiction of the board. The dispute out of which the judicial controversy arose does not merely concern rates of pay or job assignments, but rather involves a discharge of employees from positions long held and the dislocation of others from their homes. From the point of view of these employees, the critical point in the dispute may be when the change is made, for, by the time of the frequently long delayed board decision, it might well be impossible to make them whole in any realistic sense. If this be so, the action of the district judge, rather than defeating the Board's jurisdiction, would operate to preserve that jurisdiction by preventing injuries so irreparable that a decision of the board in the union's favor would be but an empty victory.

363 U.S. at 534. The Union does not ask the Court to adjudicate the merits of this dispute. It only seeks to require the airline to return to the prestrike status quo pending resolution of the grievance procedure before the System Board of Adjustment.

Alaska asserts three arguments in opposition to Plaintiff's preliminary injunction motion: (1) that the Union has not satisfied the requisites for the issuance of a preliminary injunction; (2) that Plaintiff's injuries, if any, can be satisfied through an award of damages, and (3) that Plaintiff has demonstrated little or no probability of success on the merits.

Initially, Alaska argues that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, deprives the federal courts of jurisdiction to issue injunctions in labor disputes. However, the Federal courts have, with some consistency, recognized their power to issue preliminary injunctions in response to strike-related violations of the Railway Labor Act. *See Chicago and Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570, 575

(1971); *Railway Employees v. Florida East Coast Railway Co.*, 384 U.S. 238, 252 (1966). More recently, in *ALPA v. United Airlines*, 614 F. Supp. 1020 (N.D. Ill. 1985), the court found it had jurisdiction to scrutinize the conduct of an air carrier during a strike. Notwithstanding the jurisprudence to the contrary, Alaska asserts this action must be dismissed because the Norris-LaGuardia Act deprives the court of power to issue injunctions in labor disputes, particularly in cases where there is a peaceful dispute over arbitrable grievances. *Trans International Airlines, Inc. v. International Brotherhood of Teamsters*, 650 F.2d 949, 962-63 (9th Cir. 1980), *cert. denied*, 449 U.S. 110 (1981); *Amalgamated Transit Union Division 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237 (9th Cir. 1977); *see Boys Market, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970).

Alaska's reliance on the Norris-LaGuardia Act is misplaced. In *Chicago and NWR Co. v. Transportation Union*, 402 U.S. 570, 581-82 (1971), the Supreme Court said:

> We turn finally to the question of whether Section 4 of the Norris-LaGuardia Act prohibits the use of a strike injunction in all cases in violation of Section 2 First. The fundamental principles in this area were epitomized in *International Association of Machinists v. Street*, 367 U.S. 740, 772-773 (1961):
>
> > The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions. We have held that the Act does not deprive the federal court of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. (Citations omitted.) However, the policy of the Act suggests that the court should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right.

> . . . We find it quite impossible to say that no set of circumstances could arise where a strike injunction is the only practical, effective means of enforcing the command of Section 2, First. Accordingly, our prior decision lead us to hold that the Norris-LaGuardia Act did not forbid the district court from even considering whether this is such a case.

402 U.S. at 581-82.

Alaska asserts the Norris-LaGuardia Act deprives this court of the jurisdiction to *even consider* Plaintiff's request for a preliminary injunction. However, the Supreme Court has not read the Act as a total bar to a federal court considering a request for injunction. In light of the Supreme Court's interpretation of the Act, this court has jurisdiction to at least consider Plaintiff's contentions, and it is not necessary to summarily dismiss this action pursuant to the Norris-LaGuardia Act.

Alaska also argues that a preliminary injunction is inappropriate because it is an extraordinary remedy to be used sparingly and only in clear cases. *Anderson v. United States*, 612 F.2d 1112 (9th Cir. 1980). The elements a moving party must establish to be entitled to preliminary injunction are well settled in the Ninth Circuit. The moving party must show either: (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly or sharply toward the party requesting the preliminary relief. *Aguirre v. Chula Vista Sanitary Service and Sani-Taner, Inc.*, 542 F.2d 779, 781 (9th Cir. 1976); *Goldies Bookstore v. Superior Court*, 739 F.2d 466 (9th Cir. 1984).

In determining whether a status quo injunction should issue, this court first must determine whether Plaintiff has made a showing of probable success on the merits or sufficiently serious questions about the merits to make them fair ground for litigation.

The Union argues that Alaska's recall policy of granting "super seniority" to strike replacements and the constructive discharge of many strikers constitutes a *per se* violation of the Railway Labor Act. Alaska, however, says it is not required to fill job openings with strikers awaiting recall, but instead insists on the right to fill the openings with newly hired "replacements" and crossovers with lower seniority, even when those employees are not working in that job classification at the time the vacancy arises.

Primary strikes are a "protected concerted activity" under the Railway Labor Act, *Railway Employees v. Florida East Coast Railway*, 384 U.S. 238, 246-47 (1966), and employers may not discharge strikers. A strike "represents merely an interruption in the continuity of the [employer-employee] relationship." *Florida East Coast*, *supra*, 384 U.S. at 246. Although the Union does not directly address the question of whether the Airline had a right to hire permanent replacements, it does argue that Alaska has instituted a hybrid form of super seniority that gives permanent replacements and crossovers the first crack at specialty rated, high paying positions that prior to the strike would have been awarded to the employee with the highest seniority.

However, this case does not present a question of pure super seniority because it is arguable that Alaska has for all practical purposes permanently replaced a substantial number of its employees. That ultimate finding, however, is for the System Board, not this Court.

The airline now is offering lower classified or temporary positions to strikers who wish to return to work prior to the time the jobs are offered to new hires from outside the company. Alaska says it is complying with the terms of the Back-to-Work Agreement, which the airline interprets as only requiring strikers to be recalled "after provisions of the Agreement for the filling of vacancies have been completed." These provisions in-

clude Article X, Section 1 of the Agreement, which permits vacancies to be filled through promotions. In pertinent part, the Back-to-Work Agreement provides:

> 1a. Strike mechanic, ramp service and related employees shall be recalled for service after the provision within the agreement for the filling of vacancies have been completed, but prior to the employment of new hires, but in order of classification seniority as openings occur within classifications in which they hold seniority, and shall be restored commencing with the most senior as of June 3, 1985. This process shall continue without displacing any employee from the payroll who is employed or who was given an offer of employment as of May 31, 1985. Employees will be returned to work at the station where they were employed on March 3, 1985; if there are insufficient openings at that station, the employee may file a preference bid for other stations and shall then be selected for openings at those stations on the basis of classification seniority.
>
> b. It is specifically understood and agreed that the company has no obligation to return any person to work until there is an opening.

Back-to-Work Agreement at 46-47.

Alaska denies that it has refused to fill job openings with strikers awaiting recall. Instead, the carrier argues there only is a dispute over which strikers are entitled to recall and to which jobs.

To determine whether the Union has a probable success of succeeding on the merits or has raised sufficiently serious questions going to the merits to make them a fair ground for litigation, it is necessary to compare the Back-to-Work Agreement with provisions in the new collective bargaining agreement dealing with vacancies. The Back-to-Work Agreement merely provides that me-

chanic, ramp service and related employees are to be recalled to service after the provision within the main agreement for the filling of vacancies has been complied with, but before the employment of new hires. Article 10 of the collective bargaining agreement deals with the filling of vacancies. Subsection (i) of Article 10 says that a vacancy may be filled by a new hire or by an upgrade from a lower classification if "no qualified employees bid." Unfortunately, neither the collective bargaining agreement nor the Back-to-Work Agreement defines "qualified employee." However, an interoffice correspondence from Robert E. Gray, Alaska Airlines Vice President for Industrial Relations, to all supervisors of IAM employees, is revealing as to Alaska's position on the definition of the term "qualified employee." Exhibit C to Plaintiff's Memorandum in Support of Preliminary Injunction.

In the memo, Gray indicates that a "replaced employee" who was on strike and who wishes to return to the company has the right to be put on a preferential hiring list to be rehired ahead of any new applicant. But he says any promotional opportunities still may be filled from within. Therefore, only vacancies requiring the addition of new employees must be filled with returning strikers. It appears Alaska's definition of "qualified employee" does not include strikers. Instead, Alaska apparently believes that promotions first may be filled by replacements hired during the strike, and then by those returning from the strike.

The Union contends strikers should be reemployed according to seniority. That is, if a non-striking employee with less seniority and a striking employee with greater seniority are competing for the same job, it should go to the striking employee because of his or her greater seniority. But Alaska suggests the job first should be offered to the non-striking employee without regard to seniority. Then if there is an opening because of the

promotion of the non-striking employee, striking employees are to be reemployed according to seniority.

It is difficult to predict if the Union will prevail on the merits of its claim before the System Board of Adjustment. While the Union may not have adequately demonstrated probable success on the merits, it has at least shown sufficiently serious questions going to the merits to make those questions a fair ground for litigation. The reemployment scheme initiated by the airline is somewhat similar to a super seniority plan held illegal in *ALPA v. United Airlines, supra*, 614 F. Supp. 1020. In that case, the court found that an airline's post-strike "rebidding" of job vacancies, involving granting of permanent "super seniority" to nonstriking pilots, was unlawful under the Railway Labor Act. While it is true that the carrier has the duty to make all reasonable efforts to continue its operations during the strike, its power to make new terms and conditions governing the new labor force it hires is strictly confined within the RLA. The Act imposes upon the carrier the "twin obligations" to serve the public by reasonably attempting to operate during the strike and by reasonably attempting to maintain the employer-employee relationship. *Empress Ecuatoriana De Aviacion, S.A. v. District Lodge*, 690 F.2d 838 (11th Cir. 1982). The granting of post-strike promotional preferences to replacement workers may not have been "needed" for the continued operation of Alaska during the strike.

The fact that the new replacements now outrank the strikers will continue to disadvantage them for many years. And Alaska's implementation of its promotion policy has had an ongoing daily effect on job status, rates of pay, and benefits of both the nonstrikers, who will have the first opportunity at nearly every promotion, and the strikers, who for all practical purposes never will be able to obtain higher positions. In effect, strikers will be blocked from bidding for many of the best jobs in the

Alaska system. The court has serious questions whether this can be justified as a business necessity. Therefore, the Court finds that the Union has satisfied the first element of the second *Aguirre* test by having shown that there are sufficiently serious questions going to the merits to make them a fair ground for litigation.

Secondly, the Union must show possible irreparable harm or a balance of hardships tipping decidedly toward it. The Union contends Alaska's recall policy has had a devastating impact: fewer than 10% of the strikers at three locals have been recalled to permanent positions. Because of the recall policy, the Union says its members have lost key possessions, including their homes. It argues that its members have been forced to relocate to find work or have had to accept part-time, low paying positions. Others have no job at all. All allegedly are losing and continue to lose valuable job experience essential to their careers. The Union contends such hardships cannot adequately be redressed by a favorable decision of the System Board and that an award of back wages cannot compensate for the purported trauma of a prolonged period of unemployment or for forced dislocation. The Union also argues that injunctive relief will not prejudice Alaska because requiring the recall of strikers before promoting from within will not increase its payroll.

The Airline suggests that if the System Board determines Alaska has not complied with the terms of the contract, the injury can be satisfied by an award of damages. Alaska argues that because reinstatement to previous positions, coupled with back pay, would redress any alleged wrongs to the replaced strikers, a preliminary injunction is inappropriate. *See, Sampson v. Murray*, 415 U.S. 61, 89-90 (1974); *VanArsdel v. Texas A&M University*, 628 F.2d 344 (5th Cir. 1980).

A Court recently was faced with a similar situation in *TBI v. Pan America World Airways, Inc.*, 607 F. Supp.

609, 613 (E.D. N.Y. 1985). In that case it was held that an adjustment board decision in favor of the union could be compensated by money damags.

> While the availability of monetary relief at a later date must surely be a little comfort to those out of work employees faced with immediate financial hardship, the law is clear in this circuit that lost wages do not constitute irreparable harm where the financial injury falls on an easily ascertainable group of employees capable of ultimately being redressed.

607 F. Supp. at 613.

The Union's claim here must succeed or fail on the question of whether the purported harm can adquately be compensated by monetary damages. The Court has thoroughly examined the record before it and finds only the affidavit of Marvin Sandrin, a union official, to support the claim that union members have lost their homes, cars, and other possessions. While clearly the loss of valued possessions is at best unpleasant, it is not irreparable. Monetary value can be placed on homes, cars, and boats. Therefor, if union members were wrongly dispossessed of those items by Alaska's actions, an award of damages can make them whole again. Likewise, the purportedly lost job experience not only can be compensated by a monetary award, but also by reinstatement with seniority and back pay. That leaves the alleged trauma resulting from losing a job and possessions, or from having to relocate, or from taking a lower paying position. First, the Court notes that it has *no evidence whatsoever* before it showing union members have suffered trauma. However, assuming *arguendo* that individual members have suffered trauma sufficient to entitle them to damages, the Court believes that injury adequately can be redressed by monetary damages. The Court agrees with Judge McLaughlin's reasoning in *IBT v. Pam Am. supra*, that while the availability of monetary relief at a later date may be of little comfort to

out of work Alaska employees, it is well-settled when damages purely can be compensated by a monetary award, such damages are not irreparable. *Los Angeles Memorial Coliseum v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980); *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1121 (9th Cir. 1984). Without question, lost wages and lost possessions are compensable with money. Lost seniority is as easily compensable by reinstatement with seniority. And this Court finds that any purported trauma, if it exists at all, also is compensable with money damages.

Furthermore, the mechanics unit of the IAM is an easily ascertainable group of employees capable of ultimately being redressed if that is the decision of the System Board. Accordingly, the Court finds that the Plaintiff has failed to show possible irreparable injury or a balance of hardships tipping sharply towards it and therefore is not entitled to preliminary injunctive relief.

Although the Union is not entitled to injunctive relief, this matter will not be allowed to drag on indefinitely. Therefore, the parties shall submit this matter to the five-member System Board of Adjustment within 60 days of the entry of this Order.

Consistent with the foregoing, the Motion of Plaintiff for a Preliminary Injunction is DENIED.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED the 25th day of August, 1986.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
Chief United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C85-2140M

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated DISTRICT LODGE NO. 143, and its affiliated LOCAL LODGE NO. 2202,

Plaintiff,

v.

ALASKA AIRLINES, INC.,

Defendant.

ORDER

[Filed Nov. 6, 1986]

Despite the best efforts by this Court to resolve this lengthy and often times bitter dispute between the Union and Alaska arising out of a 1985 strike, this Court once again is asked to make a decision in what essentially is a minor dispute over contract interpretation.

The history of this litigation was set forth in the order denying the Union's motion for preliminary injunction. Presently before the Court is the motion of Alaska for clarification of the Court's order of August 25, 1986.

On June 17, 1985, the Union filed a grievance on behalf of Thomas M. Gibbs, et al., No. 27988, claiming that the manner in which Alaska recalled strikers violated the back to work agreement. In its moving papers, the Union referred the Court specifically to the Gibbs grievance.

The Union sought to enjoin Alaska's recall procedures "pending exhaustion of the contractual grievance process." Although the Court denied the Union's motion for preliminary injunction, it ordered the parties to submit this matter to the five-member System Board of Adjustment within 60 days of entry of the Court's order.

Despite the order, one or both of the parties submitted this grievance to a four-member System Board on September 4-5, 1986, apparently to protect the record.

Alaska says the Union reads the Court's order as expanding the substantive scope of the Gibbs grievance to include all Union claims which are in any way related to the strike or the back to work agreement, whether originally raised by the Gibbs grievence or not. The carrier contends this interpretation confers remedial jurisdiction upon the System Board purportedly different from that authorized by the collective bargaining agreement.

Alaska, on the other hand, says the order directs the parties to submit only the Gibbs grievance to the System Board for arbitration. It contends the order does not rewrite the Gibbs grievance or the parties' collective bargaining agreement. Nor does the order rewrite the charter of the System Board. The airline argues that the order simply directs the parties to proceed within a fixed time frame to present the Gibbs grievance to the five-member System Board. It says procedural, substantive and remedial provisions of the collective bargaining agreement regarding grievances and System Board hearings remain in full force and effect.

The Union takes a different view of the Court's order. In its complaint, the Union claimed Alaska promoted persons in lower work classifications in lieu of recalling eligible former strikers, and gave replacements and nonstrikers superseniority for job bidding purposes. The Union also alleged that Alaska refused to provide documents critical in processing contractual grievances. Be-

sides copies of the Gibbs grievance, which broadly challenged Alaska's recall policies, the Union also provided evidence of Alaska's alleged wrongful bidding practices, promotional practices, purported refusal to provide documents, and the consequences of those actions for employees who participated in the strike.

Alaska's motion to clarify raises two issues requiring separate consideration. First, Alaska appears to contend that it should not be required to arbitrate the promotion, job bidding or recall dispute issues, but instead only should be required to arbitrate specific purported contractual violations that allegedly occurred in the two weeks immediately following the strike. The Court is at a loss to explain how Alaska possibly could read the order so narrowly. No where does the Court's order refer specifically to the Gibbs grievance. The gravamen of the Union's complaint, and the specific subject matter of the motion for preliminary injunction, is the Alaska recall policy. The Union filed a contractual grievance over that recall policy. The Gibbs grievance alleges a violation of the back to work agreement based upon the recall policy.

At a hearing held by a four-member System Board of Adjustment, counsel for the Union stated it was his understanding that the Gibbs grievance was a class action challenging certain practices of Alaska, which he claimed were designed to preclude former strikers from returning to work and to otherwise discriminate against them in violation of the contract. It was the Union's position that the grievance was broadly worded to encompass the purported continuing violation of the back to work provisions dealing with recall of former strikers, including the use of temporary positions. The Union's position substantially comports with the ruling of the Court. Moreover, the Court is unable to determine exactly what issues Alaska does not want the System Board of Adjustment to adjudicate.

So that there is no further dispute about the breadth of the Court's order, the five-man System Board of Adjustment shall, in accordance with its normal procedures, hold a hearing and issue a ruling on the disputes involving *all issues* related to the recall of strikers covered by the Mechanics Union contract with Alaska Airlines following the 1985 strike. The System Board of Adjustment shall consider the mandate of this Court to be broad enough to cover all issues in dispute, including the use of temporary employees, if the Board shall find that such a use violated the agreement between the parties. The Court finds without merit Alaska's argument that the preliminary injunction request only was related to the Gibbs grievance, and notes that the exhibits submitted in support of the motion for preliminary injunction make it clear that the issue before the Court involved all aspects of Defendant's recall policies.

The second issue raised by Alaska's memorandum is whether the Court intended to give the System Board power to award compensatory damages, should it decide that Alaska's conduct was wrongful. It is unclear from the agreement between the parties whether the System Board has the authority to award compensatory damages. The agreement clearly provides that the System Board may make an "award." The Railway Labor Act, 45 U.S.C. § 184, does not define the limitations of a System Board sitting in a case such as this. However, it is implicit that the term "award" is broad enough to encompass the damages sought by the Union. Additionally, insofar as this Court has retained jurisdiction over these proceedings, any award would be reviewable if either party, or both, was dissatisfied with the result reached by the System Board.

Accordingly, insofar as Alaska's motion can be construed as being one to limit the scope of the Court's order of August 25, 1986, the motion is DENIED.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED the 6th day of November, 1986.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
Chief United States District Judge

APPENDIX C

STATUTORY SUPPLEMENT

45 U.S.C. § 152

* * * *

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * *

Eighth. Notices of manner of settlement of disputes; posting. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

ISSUE NO. 7

Repudiating the contractual bidding system by failing to bulletin jobs or awards.

There is no evidence to establish that there was any violation of the CBA in the manner in which the jobs or awards were bulletined or not bulletined.

ISSUE NO. 8

Recalling employees to work out of seniority order.

The evidence submitted herein does not establish that striking employees were recalled to work out of seniority order. However, if there are individual instances, such should be submitted to the System Board.

CONCLUSION

The Board will retain jurisdcition [sic] in this case. If there are specific issues not answered by this opinion, those specific issues will be addressed by the Board. Furthermore, the Board will retain jurisdiction to hear individual disputes arising out of this opinion. This does not result from a desire of the Board to hear such cases. This decision was based upon the order of the Federal Court directing that all issues arising out of the "Gibbs *et all* [sic]" grievance be submitted to a System Board. Also, it was the opinion of the arbitrator that perhaps such grievances could be resolved more expeditiously by this Board than by creating another board. The arbitrator herein is not only willing but would be pleased if the individual grievances were submitted to another System Board.

The parties are directed to comply with the above award as stated.

s/Preston J. Moore
Neutral Member

Company concurs on issues #2, 3, 4, 6, 7 and 8.

s/William MacKay
Company Board Member

Company dissents on issues #1 and 5.

s/Gail Neufeld
Company Board Member

s/Carolyn Moe
Union Board Member

Union concurs in part and dissents in part.

s/Suzie Welch
Union Board Member

March 1, 1988